No. 12,565

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. COX,

Appellant,

vs.

LIEUTENANT GENERAL A. C. WEDEMEYER, Commanding Officer of the Sixth Army, Presidio, San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", dismissing petition for writ of habeas corpus and discharging writ of habeas corpus. (See Tr. 1-15, Vol. I.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below discharging the writ of habeas corpus and dismissing the petition for writ of habeas corpus. (See Tr. 1-15, Vol. I.)

Appellant, by habeas corpus, challenged the jurisdiction of an Army General Court Martial to retry him for the offense of desertion in time of war, his first conviction having been reversed by the reviewing authority on the ground that prejudicial hearsay testimony was received in evidence against him.

At page 3 of his opening brief appellant declares that the Court below in its memorandum opinion[1] made "a fair presentation of the basic facts of the case". With this appellee agrees, although appellee respectfully says that he cannot concur in the conclusion of the Court below with reference to the sincerity of the appellant in the light of appellant's misrepresentations made to his employer, in securing employment after his desertion from the army, that he was an honorably discharged veteran. Inasmuch as appellee has included in the appendix to his brief the memorandum opinion of the Court below, he incorporates here by reference these facts from the said memorandum opinion.

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[1]See appendix this brief.

CONTENTIONS OF APPELLANT.

Appellant contends in substance that:

(1) He never took the oath during the induction ceremonies, and accordingly he never became a soldier, and therefore is not subject to military jurisdiction.

(2) Appellant's order of induction was void because it was based upon the arbitrary actions of his local and appeal boards, and accordingly he never became a soldier and is not subject to military jurisdiction.

(3) Even if appellant was validly inducted and is subject to military jurisdiction, his prosecution is barred by the statute of limitations.

ARGUMENT.

Appellee begins his argument by reference to the familiar rule that the burden of proof in this proceeding is upon the appellant, a burden which he has completely failed to meet, *Walker v. Johnston,* 312 U.S. 275, as cited in *United States ex rel. Lawrence v. Commanding Officer of McCook Army Air Field, et al.,* 58 Fed. Supp. 933, 938, 939, and to the equally familiar rule that, "It must be assumed, in the absence of a contrary showing, that the officers charged with his induction took such steps for it as they were bounden to take under the Army regulations". *Miller v. Commanding Officer,* 57 Fed. Supp. 884, 887. See

also *United States v. Jones,* (CCA-9), 176 F. (2d) 278, wherein it was said, at page 282:

> "* * *. At the same time, presumption of legality attaches to the act of a public officer. As Chief Justice Marshall put it in an old case, an act done by an officer authorized by law to perform it 'carries with it prima facie evidence that it is within his power' and 'he who alleges that an officer intrusted with an important duty has violated his instructions must show it'. Delassus v. United States, 1835, 9 Peters 117, 134, 9 L. Ed. 71. And see, United States v. Coe, 1898, 170 U.S. 681, 696-697, 18 S. Ct. 745, 42 L. Ed. 1195; Lamport Mfg. Supply Co. v. United States, 1928, 65 Ct. Cl. 579, 610."

I. THE ALLEGED FAILURE TO TAKE THE OATH.

The appellee does not concede that the oath is a prerequisite of induction. See *In re Louis Kruk* (D.C. N.D. Cal.), 62 Fed. Supp. 901, interpreting *Billings v. Truesdell,* 321 U.S. 542. There is no necessity, however, for appellee to discuss this proposition, inasmuch as the Court below concluded that the appellant had actually taken the oath. Said the Court below, in distinguishing the facts in our case at bar from the facts of the case as set forth in the opinion of this Honorable Court in *Lawrence v. Yost,* 157 F. (2d) 44, a decision upon which the appellant strongly relies:

> "* * * In short, his testimony that he had not taken the oath was supported by persuasive documentary and other evidence.

> In the case at bar the testimony of petitioner is not so supported. On the contrary, many circumstances compel the conclusion that his statement is incorrect."

A reading of the rather lengthy opinion of the Court below indicates that it made a thorough and careful analysis of the facts and the law applicable to this phase of the case. Accordingly, the appellee therefore adopts *in toto* these findings of fact and conclusions of law made by the Court below and the authorities cited in support thereof as his argument against the contention made by the appellant with relation to his alleged failure to take the oath.

II. THE ALLEGED ARBITRARY ACTIONS OF THE LOCAL AND APPEAL BOARDS.

Appellant contends that in failing to classify him as a conscientious objector in Class 4 E (availability for work of national importance under civilian direction but not available for either combatant or noncombatant military service), or as a Minister of Religion in Class 4 D, (exemption from service of any kind, either military or civilian), his local and appeal boards acted arbitrarily and capriciously.

In *Estep v. United States,* 327 U.S. 114, 122, 123, the Supreme Court declared:

> "* * *. The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this

> Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

In its decision in the *Estep* case, the Supreme Court cited the case of *Goff v. United States,* 135 F. (2d) 610, 612. In this latter case, the United States Court of Appeals for the Fourth Circuit said:

> "* * *. But as we said in the case of Adrian Elwood Baxley v. United States, 4 Cir., 134 F. 2d 998, this does not mean that the court in a criminal proceeding may review the action of the board. *That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right.* Nothing in the evidence offered in the court below tended to show anything of this sort. Adrian Elwood Baxley v. United States, supra; United States v. Kauten, 2 Cir., 133 F. 2d 703; Seele v. United States, 8 Cir., 133 F. 2d 1015; Rase v. United States, 6 Cir., 129 F. 2d 204; Johnson v. United States, 8 Cir., 126 F. 2d 242; United States v. Pace, D.C., 46 F. Supp. 316; United States, v. DiLorenzo, D.C., 45 F. Supp. 590; United States v. Newman, D.C., 44 F. Supp. 817." (Emphasis supplied).

The Court below in its memorandum opinion, in exacting detail, considered the second contention advanced by the appellant that he had been denied due process under the Selective Service Act and, with the same persuasive reasoning which it had employed in disposing of the first allegation of the appellant, found this contention to be likewise without merit. Accordingly the appellee also adopts *in toto* these findings of fact and conclusions of law made by the Court below and the authorities cited in support thereof, together with the additional authorities heretofore cited by appellee herein, as his argument against the unsupported and unfounded allegation made by appellant that the Local Board and the Appeal Board had acted arbitrarily in classifying him in a classification other than Class 4 E or Class 4 D.

III. THE ALLEGED LOSS BY THE COURT-MARTIAL OF ITS JURISDICTION OVER THE APPELLANT UNDER THE STATUTE OF LIMITATIONS.

In its memorandum opinion the Court below had only this to say concerning the proposition advanced by the appellant that the court-martial had lost jurisdiction to try the appellant under the statute of limitations:

> "With respect to petitioner's contention that his prosecution is barred by the statute of limitations, I am compelled to hold according to my interpretation of the applicable statutes that there is no statute of limitations applicable to desertion in time of war."

A reading of the 39th Article of War, Title 10 U.S.C.A. Section 1510 clearly indicates that there is no limitation upon prosecutions for desertion in time of war. This is so fundamental, that appellee feels that he does not have to answer appellant's unsupported and illogical arguments thereon. That we are still at war, so far as prosecutions are concerned, for the offense of desertion in time of war, may be seen by reference to Joint Resolution, July 25, 1947, Chapter 327, Section 3, 61 Stat. 451. Assuming, arguendo, that the statute of limitations is a bar against prosecution for the offense of desertion in time of war, it is a defense which must be raised before the military court, and is certainly not a defense to be entertained by a civil Court, particularly in a habeas corpus proceeding. See

In re White (C.C.Cal.), 17 Fed. 723;
In re Davison (C.C.N.Y.), 21 Fed. 618, 619;
In re Zimmerman (C.C.Cal.), 30 Fed. 176, 177;
In re Cadwallader (C.C.Mo.), 127 Fed. 881.

See also *Ex parte Benton* (D.C.N.D. Cal.), 63 Fed. Supp. 808, 809, 810, wherein the Court defines the limitations of a civil Court with reference to courts-martial.

SUMMARY.

To summarize—the Court below found against the appellant in his allegation that he had not taken the oath, thus obviating the necessity of a discussion as to whether or not the oath was a prerequisite of in-

duction at the particular time the appellant reported for induction in response to an order from his Local Draft Board. Similarly, the Court below found that there was no basis in fact for the classification of 4 D sought by the appellant, as it also found that the appellant had abandoned his claim for a classification of 4 E when he made his appeal to the Appeal Board from the classification of 1A-O (availability for non-combatant military service) accorded him by his Local Board. That there was substantial evidence to support these findings cannot be seriously questioned although appellant seeks unsuccessfully to do so. Two briefs have been filed on behalf of appellant, including an Amicus Curiae brief filed by the American Society of Friends. Both of these briefs are replete with authorities not in point, and which appellee feels under no obligation to discuss, particularly in light of the persuasive opinion of the Court below which is conclusive answer to each and every contention advanced by the appellant before it and before this Honorable Court. That the findings of the Court below, supported by substantial evidence, cannot be disturbed is a principle as clearly established as is the principle that the statute of limitations is not applicable to a charge of desertion in time of war, and the further principle that this defense of the statute of limitations cannot be raised by way of habeas corpus. Accordingly appellant, whose induction order was based on a valid classification was duly inducted into the Army of the United States, and thus became subject to military jurisdiction and liable to prosecution

by a general court-martial for the offense of desertion which he committed in time of war.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below, dismissing appellant's application for a writ of habeas corpus, is correct, and should be affirmed.

Dated, San Francisco, California,
March 23, 1951.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

[Title of Court and Cause.]

"MEMORANDUM OPINION

This action involves a petition for a writ of habeas corpus alleging that petitioner is unlawfully imprisoned under the color of authority of the respondent. Upon issuance of the writ and return thereto by the respondent, a hearing was held, at which time the following facts were determined:

1. On June 20, 1941, the petitioner, Milton Harold Cox, returned his Selective Service Questionnaire to the Local Draft Board No. 111, Santa Clara County, California, as required by the Selective Training and Service Act of 1940. In this questionnaire the petitioner indicated by appropriate notation that by reason of religious training and belief he was conscientiously opposed to participation in military service. At that time he made no claim to being a minister or student preparing for the ministry.

2. On June 25, 1941, the petitioner personally delivered to the local board a letter claiming that he was an ordained minister of religion for Jehovah's Witnesses, entitled to a IV-D classification, and requesting such classification. Apparently this letter with supporting document was lost or misplaced in the records of the local board.

3. On February 6, 1942 the Special Form for Conscientious Objectors—DSS Form 47—was sent by the local board to the petitioner.

4. On February 9, 1942 the petitioner wrote to the local board enclosing copies of his letters of June 1941, stating that they were the basis for his requested classification as a minister of the gospel, and that he had been advised that the local board had no record of these letters.

5. On February 15, 1942 the Chairman of the local board Will B. Weston made a written memorandum which was placed in petitioner's selective service file to the effect that he had personally investigated petitioner's objections to service, found them to be sincere, and recommended his classification as IV-E (conscientious objector). On February 19, 1942 the petitioner filed with the local board the above mentioned Form 47 Special Form for Conscientious Objectors, in which he reiterated his claim for exemption as a conscientious objector and explained in detail the basis for the claim.

6. Nevertheless, the local board classified the petitioner I-A-O. Therefore, on March 16, 1942 petitioner appealed from this I-A-O classification and requested that the Appeal Board of Santa Clara County place him in classification of IV-D, minister of the gospel. This appeal is of importance in this case, and therefore is quoted in full. It reads as follows:

> "Gentlemen:
> "I hereby appeal from the classification 1A-O given me by Santa Clara County Draft Board No. 111 and request that I be placed in class 4-D by reason of the fact that I am a minister of the gospel.

"I am a member of Jehovah's Witnesses and we are taught and instructed to preach the word of God direct from the Bible. Membership in the organization makes each member a minister of the gospel with the duty to preach the word of God.

"I have not attended any religious school but have studied under the direction of the leaders in Jehovah's Witnesses.

"I am employed by Pacific Manufacturing Company during the day but hand out booklets and literature to people who are interested and play phonograph records to people who are interested and then return to talk with them upon request. I contend that these facts make me a minister and respectfully request that I be placed in class 4-D.

Respectfully submitted,
MILTON HAROLD COX." (Sgd.)

On April 10, 1942 the Appeal Board returned the petitioner's file to the local board, affirming the I-A-O classification on the ground that the petitioner did not appeal as a conscientious objector "but *only* because he claims to be a minister of religion", which latter claim could not be upheld. The letter denying the appeal reads as follows:

"Dear Sirs:

"We are sending you herewith the questionnaire and file of Milton Harold Cox, No. 4685.

"The action of your board in placing the registrant in Class 1-A-O has been affirmed.

"The registrant does not appeal as a conscientious objector, but only because he claims to be a

minister of religion. He says in his appeal that every member of Jehovah's Witnesses is a minister of the gospel. This would seem to leave no one to form the body of the church or congregation and this board is of the opinion that registrant does not qualify either as an ordained or as a regular minister of the gospel.

Very truly yours,
BOARD OF APPEAL NO. 9
CCC:GOC By C. C. Coolidge (Sdg.)
Inclosure Chairman"

7. Upon advice from the State Director of Selective Service that the petitioner's name was not listed on the Certified List of Jehovah's Witnesses who were entitled to consideration for a IV-D classification, the local board on May 8, 1942 notified the petitioner that his I-A-O classification would stand.

8. On June 12, 1942 the petitioner reported for induction at the induction station in San Francisco. He claims that he did not take the induction oath at this time or at any time, but that he continued on to the Presidio at Monterey with his draft group on the representation that he would there get a further hearing on his classification.

9. While at Monterey petitioner allegedly signed a statement purportedly abandoning his claim as a conscientious objector. The petitioner claims he never signed such a statement. The validity of his signature to this document was never proved. There is no foundation for the admission of this alleged statement in evidence, therefore, it is ordered stricken from the record, and this Court disregards it.

10. Petitioner was then sent to a basic training camp in Alabama. He refused to take part in military training and at the first opportunity boarded a train and returned to his home in San Jose, where he has resided openly ever since.

Petitioner obtained a job with one of his former employers, thereafter changed his employment from time to time, but at all times remained in San Jose. He made absolutely no attempt to conceal his identity, or his address, or residence, or whereabouts. He was arrested by agents of the Federal Bureau of Investigation about May, 1949, almost seven years after he had left Camp Rucker in Alabama. During this period he has supported his wife, and so far as the record shows has been a law-abiding industrious citizen.

The Army did not turn over his name to the Federal Bureau of Investigation until April, 1949, and its agents had no trouble whatever in finding and apprehending him. They just went to San Jose, located him and arrested him. In this connection it might be mentioned that after his return to San Jose in discussing his military status with his employers, or prospective employers, he stated that he had received a medical discharge from the Army.

After his arrest he was turned over to the Army authorities, and tried by a court martial for desertion in time of war, found guilty, and sentenced to five years at hard labor. This conviction was set aside and a retrial ordered. Pending this retrial he brought these proceedings.

Petitioner's contentions here consist of the following:

1. That his order of induction was void because there was no substantial basis in his selective service record for the classification order made in his case;

2. That he never took the oath during the induction ceremonies and accordingly never became a soldier; and

3. That his prosecution by court martial is barred by the statute of limitations.

Regarding his first contention we agree with the petitioner that while this Court cannot review the decision of a local board or an appellate board in a proceeding of this kind, it has the power in a habeas corpus proceeding to determine whether the original classification and induction order was arbitrary, or capricious, or the result of the denial of a full and fair hearing. *U. S. ex rel. Lawrence v. Commanding Officer,* 58 F. Supp. 933, and cases therein cited.

In determining this question this Court is limited to the record in the petitioner's file. *U. S. ex rel. Hull v. Stalter,* 151 F.(2d) 633; *Miller v. U. S.,* 169 F. (2d) 865, 868.

If the record discloses that there was no substantial basis therein for the classification order made therein, this Court has the jurisdiction to declare the order of induction void. If we were dealing in this case with the petitioner's selective service record up to his classification by his local board I would feel

that the contention of petitioner is correct, and that there was no basis for the classification order that was made. In other words, the petitioner's selective service file up to the time of his appeal from the order giving him the classification of 1-A-O showed no basis for giving him any other classification than that claimed by him, to wit, conscientious objector. The difficulty with petitioner's contention in this respect, however, develops from an examination of what occurred in connection with his appeal from the first order of his local board. It has been pointed out in previous decisions that before a draftee may attack the validity of an induction order he must exhaust his administrative remedies, that is, he must take the appeals provided for either by the statute or regulations. In this case as heretofore pointed out, the petitioner took an appeal from the classification given him by the local board on the ground not that he was a conscientious objector, but that he was a minister of the gospel. His claim that he was a minister of the gospel has no basis in fact, and is not supported in any respect by his selective service file. Accordingly the appeal board's order rejecting his appeal on this ground may not be attacked.

Petitioner contends that since he took an appeal from the local board's classification, even though his specified ground for such appeal was that he should have been classified as a minister, that the appeal board should have examined his Selectve Service file and classified him as a conscientious objector, which

clearly the local board should have done. Petitioner bases this contention upon the cases which hold that the appeal board is not bound by the local board's classification, and it should review the case *de novo,* and its classification supersedes the action of the local board.

United States v. Pitt, 144 Fed. (2d) 168;
Reel v. Badt, 53 F. Supp. 906, 907;
Cramer v. France, 148 F. (2d) 801.

Petitioner argues that it follows from this premise that the appeal board should have followed the procedure indicated by Section 5(g) of the Selective Training and Service Act of 1940 (50 USCA 305(g)) and paragraph 627.25 of the Selective Service Regulations, and that it did not follow this procedure, and did not give the petitioner the hearing and investigation required thereby, and therefore it denied him the due process of the law.

The difficulty with this argument is that it ignores the fact that the appeal taken by petitioner was limited solely to the claim that he should have been classified as a minister. By thus limiting his appeal he impliedly, if not expressly, abandoned his claim to be classified as a conscientious objector. Said section 627.25 of the Regulations says in part:

> "If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector * * *"

In this case petitioner's appeal did not involve the question whether his claim as a conscientious objector

should be sustained. Moreover, Section 5(g) of the Act, which said section 627.25 of the Regulations was meant to implement says:

> "* * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in Section 10(a)(2). *Upon the filing of such appeal with the appeal board,* the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof."

In this action petitioner did not file with the appeal board *such an appeal,* that is, an appeal from the local board's refusal to classify him as a conscientious objector.

Since petitioner's appeal was limited to the failure of the local board to classify him as a minister, he cannot now claim that the appeal board should have gone into the question of his classification as a conscientious objector. To require an appeal board when an appeal is taken on one particular ground to examine the entire file and seek out any other ground it could find for rejecting the local board's classification would be, it seems to me, placing a burden upon such a board never intended by the Act or regulations, and entirely inconsistent with the national exigencies which said Act and regulations were intended to meet. I feel that in the case of an appeal such as was taken in this case the appeal board was justified in assuming

and had the right to assume that all other grounds of appeal had been abandoned.

This view is supported by *United States v. Flint,* 54 Fed. Supp. 889, affirmed in *Altieri v. Flint,* 142 F. (2d) 62, where it is suggested that an appeal to an appeal board solely upon one ground may be considered an abandonment of any other ground.

For the foregoing reasons I feel that petitioner's claim that he was inducted without due process cannot be sustained.

Regarding petitioner's second contention he never took the oath, and therefore never was inducted into the Army, under the circumstances of this case I cannot find this claim to be correct. The burden of proof to sustain this contention by a preponderance of the evidence is upon the petitioner. There is no direct evidence he did not take the oath, except that of the petitioner himself.

He testifies he appeared for induction in San Francisco on June 12, 1942, together with other draftees from Santa Clara County; that he told an officer there that he was a conscientious objector, and was told by this officer, whose name he did not know, to go ahead with his physical examination and that he would be given a hearing in Monterey on his claim as a conscientious objector. He then took the physical examination along with said other draftees. He says that then they were all taken into a room and stood in rows, that he was on the left end about three rows

from the front; that an oath was read to them; that he never raised his hand, but turned his back, and then or thereafter told the said officer that he did not take the oath, and that he was a conscientious objector. The only attempted corroboration of his statement that he did not take the oath is the statement of his wife that he telephoned her from Monterey that he had not taken the oath, and of two of his associate Jehovah's Witnesses to the effect he met one Wright in April, 1943, nine months after he left Camp Rucker and told him he had not taken the oath, and one Farmer whom he met shortly after his return to San Jose to whom says Farmer he made the same remark.

There is no record in his Selective Service file or in his files and letters, or elsewhere, as far as the evidence is concerned that he ever claimed that he had not taken the oath, except the testimony above-mentioned. Petitioner contends that his exhibit 4, which was a letter he wrote to his wife from Camp Rucker, Alabama, is a written record that he did not take the oath, but this document says nothing about such refusal or failure.

Petitioner's situation is entirely different from that of the draftee in *Lawrence v. Yost,* 157 F. (2d) 44. There the draftee testified that when the oath was administered to a group of inductees he failed and refused to take it. His statement was corroborated by his acts preceding and immediately subsequent to his attempted induction. He was outspoken he would not

take the oath, and had not taken it. Immediately after the induction service he told the officers that he would not report to the Army and that he had not taken the oath and he did not report to the Army. He returned to his home and reported to the Clerk of his local board that he had not taken the oath. The Clerk made a written note to that effect in his file. Sometime after he made a full written report to the Federal Bureau of Investigation to the same effect. In short, his testimony that he had not taken the oath was supported by persuasive documentary and other evidence.

In the case at bar the testimony of petitioner is not so supported. On the contrary many circumstances compel the conclusion that his statement is incorrect. He failed to tell his local board that he had not taken the oath. He made no written statement to that effect to any official in the Army, or connected with the local board. Instead of refusing to report to the Army as in the *Yost* case he went voluntarily from the Presidio in San Francisco to Monterey, and from there to Camp Rucker, Alabama, he designated his wife as his beneficiary, he wore the uniform of the Army, accepted a pay check and other Army benefits, including free mailing privileges accorded a soldier. In writing to his wife from Alabama he did not tell her he had not taken the oath. When he applied for positions after his return to San Jose the excuse he gave for not being in the Army was to the effect that he had received a medical discharge, and when he was apprehended and arrested, and at his first court martial, he never made any claim that he had not taken

he oath. These and other circumstances compel me o find that he has not sustained the burden of prov- ng he was not properly inducted. Moreover, it might e said also that these circumstances show that his onduct after leaving the induction center amounted o a waiver of any irregularity in his induction.

Mayborn v. Heflebower, 145 F. (2d) 864;
Sanborn v. Callan, 148 F. (2d) 376.

With respect to petitioner's contention that his rosecution is barred by the statute of limitations, I m compelled to hold according to my interpretation f the applicable statutes that there is no statute of mitations applicable to desertion in time of war.

Conclusion

For the foregoing reasons I am constrained to dis- harge the writ heretofore issued. I do so with regret, owever, because I feel that in view of the fact peti- oner was a sincere conscientious objector according o the finding of the chairman of his own local board e should have been classified as such. I believe also hat as he has been a law abiding industrious citizen nce he left the Army in August, 1942, it is deplorable hat he should be taken from his home and work and rosecuted for his desertion at this late date, particu- arly as he made no effort at any time to conceal his xistence or whereabouts. I also feel that in view of ll the circumstances of this case that the original sen- ence meted out to him was excessive, unreasonable nd inhuman, and that his case should be treated with he utmost leniency. If it were the province of this

Court to mete out the punishment, if any, in this case, the sentence imposed would be the slightest legally possible. Having no further jurisdiction over this matter, however, I can only express the hope that any military tribunal or executive official exercising jurisdiction over the petitioner in the future will give consideration to the views expressed herein.

Wherefore, the Petition for Writ of Habeas Corpus will be dismissed, the Writ of Habeas Corpus heretofore issued will be discharged, and the Petitioner remanded to the custody of the Respondent; but pending an appeal from the decision of this Court he shall be enlarged upon recognizance with surety in the sum of $500.00 for appearance to answer the judgment of the appellate court.

Dated: April 27, 1950.

Herbert W. Erskine,
United States District Judge."